Supreme Court, U.S.
FILED

MAR 14 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES T. LESTER, JR.
TERESA WYNN ROSEBOROUGH*
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996
(404) 853-8000

THOMAS J. HENDERSON
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005-0400
(202) 662-8600

RICHARD GILL
COPELAND, FRANCO, SCREWS & GILL
P.O. Box 347
Montgomery, AL 36101-0347
(334) 834-1180

ROBERT L. WIGGINS, JR.
GORDON, SILBERMAN, WIGGINS & CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, AL 35203
(205) 328-0640

* *Counsel of Record*

Attorneys for Petitioners

QUESTIONS PRESENTED

Whether a district court's role in overseeing a remedial consent decree over which it has jurisdiction is limited to instituting contempt proceedings for violation of particular provisions of the consent decree, or whether the court may exercise its equitable powers to advise against or prohibit practices which undermine the purpose of the decree?

Whether an appellate court, without request of any party and without providing counsel with notice and an opportunity to be heard, may find that counsel's conduct before the district court below constituted abuse of judicial process warranting possible imposition of sanctions under 28 U.S.C. § 1927.

Whether an appellate court departs from the accepted course of judicial process by making findings of fact based on its own erroneous construction of evidence in the record.

Whether an appellate court has authority to vacate district court orders that are not before the appellate court.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Plaintiff-Appellee Class Representatives and Plaintiff Class Members, now Petitioners:

Johnny Reynolds, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Ouida Maxwell, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Martha Ann Boleware, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Peggy Vonsherie Allen, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Jeffery W. Brown, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Cecil Parker, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Robert Johnson, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Frank Reed, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Florence Belser, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

C. Campbell Wilson, Intervenor –Plaintiff-Appellee – member of the Plaintiff class;

Adams Intervenor-Appellant Class Representatives and Adams Class members of non-black employee class, now Respondents:

William Adams, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Cheryl Caine, on behalf of herself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Tom Colquitt, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

William Flowers, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Wilson Folmar, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

George Kyser, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Becky Pollard, on behalf of herself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Ronnie Pouncey, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Terry Robinson, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Tim Williams, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Michael Grant, member of Adams class of non-black employees;

John D'Arville, member of Adams class of non-black employees;

Andrew McCullough, member of Adams class of non-black employees;

Defendant-Appellees, now Respondents:

G.M. Roberts, in his official capacity as Director of the Alabama Department of Transportation, Defendant-Appellee;

Department of Transportation, State of Alabama, Defendant-Appellee;

Department of Personnel, State of Alabama, Defendant-Appellee;

State of Alabama, Defendant-Appellee;

Donald Siegelman, in his official capacity as Governor or the State of Alabama, Defendant-Appellee;

Ray Bass, Defendant-Appellee;

Marvin Wagonner, Defendant-Appellee;

Thomas G. Flowers, Director of the State Personnel Department, Defendant-Appellee.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	vi
Table of Cited Authorities	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	3
I. Proceedings in the District Court	3
A. The *Reynolds/Frazer* Litigation	3
B. Proceedings Concerning Unforeseen Abuses of the Grievance Process	6
II. Proceedings in the Court of Appeals	9
Reasons for Granting the Writ	11
I. The Eleventh Circuit's Holding That the Authority of the District Court To Oversee the Consent Decree Is Limited to Its Contempt Power Conflicts with Federal Law.	11

Contents

Page

A. The District Court Did Not Abuse Its Discretion in Granting Both the Preliminary Injunction and the Declaratory Judgment. 12

B. Contempt Proceedings Would Have Been Inappropriate Under the Circumstances of this Case. 15

II. The Eleventh Circuit Denied Plaintiffs' Counsel Fundamental Due Process When It Held That Counsel's Conduct Was Abusive and Required Plaintiffs' Counsel to Show Cause As to Why Section 1927 Sanctions Should Not Be Imposed. 17

A. The Eleventh Circuit Exceeded the Scope of Its Authority in Finding That Plaintiffs' Counsel Abused Judicial Process. 18

B. The Eleventh Circuit Violated Counsel's Constitutional Rights by Finding That Counsel Had Engaged in Sanctionable Conduct without Affording Counsel Even the Most Basic Due Process. 20

III. The Eleventh Circuit Exceeded Its Authority by Disregarding the District Court's Factual Findings. 22

Contents

Page

A. The Eleventh Circuit Did Not Grant the Requisite Deference to the District Court's Findings of Fact. 23

B. The District Court Relied on Substantial Record Evidence to Find That the Plaintiff Class Would Be Injured by Implementation of Noncompetitive Appointments Through the Grievance Procedure. 25

IV. The Eleventh Circuit Exceeded Its Authority Under 28 U.S.C. § 2106 by Overruling Orders Which Were Not Before the Court. 27

Conclusion 29

Appendix — Bound Under Separate Cover

TABLE OF CITED AUTHORITIES

Page

Cases:

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 23

Alexander v. Hill, 707 F.2d 780 (CA4 1983) 13

Aluminum Co. of America v. Beazer East, Inc., 124 F.3d 551 (CA3 1997) 13

Anderson v. Bessemer City, 470 U.S. 564 (1985) 22, 23, 24

Angelino v. N.Y. Times Co., 200 F.3d 73 (CA3 1999) 20

Avirgan v. Hull, 932 F.2d 1572 (CA11 1991) 19

Berger v. Heckler, 771 F.2d 1556 (CA2 1985) 12, 13

Braley v. Campbell, 832 F.2d 1504 (CA10 1987) 18, 19, 20

Brewster v. Dukakis, 675 F.2d 1 (CA1 1982) 13

Bundy v. Jackson, 641 F.2d 934 (C.A.D.C. 1981) ... 24

Chambers v. Nasco, Inc., 501 U.S. 32 (1991) 20

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 24

Cited Authorities

Page

Edwards v. General Motors Corp., 153 F.3d 242 (CA5 1998) 19

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 14

Gates v. Collier, 616 F.2d 1268 (CA5 1980) 12

Golden v. Zwickler, 394 U.S. 103 (1969) 13

Green v. School Bd. of Hillsborough County, 25 F.3d 974 (CA11 1994) 24

Gregory v. Depte, 896 F.2d 31 (CA3 1990) 16

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986) 24

In re Pearson, 990 F.2d 653 (CA1 1993) 13

In re Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d 1539 (CA11 1996) 15

Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844 (1982) 23

King v. Allied Vision, Ltd., 65 F.3d 1051 (CA2 1995) 16

Larsen v. City of Beloit, 130 F.3d 1278 (CA7 1997) 20

Cited Authorities

	Page
Lee v. L.B. Sales, Inc., 177 F.3d 714 (CA8 1999)	19
Limerick v. Greenwald, 749 F.2d 97 (CA1 1984)	19
Marshall v. Lonberger, 459 U.S. 422 (1983)	24
McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949)	15
Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036 (CA7 1991)	24
Newman v. Alabama, 683 F.2d 1312 (CA11 1982)	11
Peterson v. BMI Refractories, 124 F.3d 1386 (CA11 1997)	18
Powell v. McCormack, 395 U.S. 486 (1969)	12, 13
Reynolds v. ALDOT, 972 F. Supp. 566 (M.D. Ala. 1997)	7
Reynolds v. ALDOT, 996 F. Supp. 1130 (M.D. Ala. 1998)	*passim*
Reynolds v. ALDOT, 84 F. Supp. 2d 1339 (M.D. Ala. 2000)	8, 21
Reynolds v. ALDOT, No. 4411, slip op. (M.D. Ala. April 18, 2000)	27, 28

Cited Authorities

Page

Reynolds v. Roberts, 846 F. Supp. 948 (M.D. Ala. 1994) 5

Roadway Express v. Piper, 447 U.S. 752 (1980) .. 17, 20

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 14

Sakon v. Andreo, 119 F.3d 109 (CA2 1997) 20

60 East 80th St. Equities v. Sapir (*In re 60 East 80th Street Equities*), 218 F.3d 109 (CA2 2000) 20

Scott-Burr Stores Corp. v. Wilcox, 194 F.2d 989 (CA5 1952) 13

Smith v. Miller, 665 F.2d 172 (7th Cir. 1981) 14

Stutson v. United States, 516 U.S. 163 (1996) 28

System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961) 13

Teamsters v. United States, 431 U.S. 324 (1977) .. 14

Ted Lapidus, S.A. v. Vann, 112 F.3d 91 (CA2 1997) 19

Thornton v. General Motors Corp., 136 F.3d 450 (CA5 1998) 20

Page

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626 (CA9 1987) 18, 19

United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970), *aff'd*, sub nom. *NAACP v. Allen*, 493 F.2d 614 (CA5 1974), *further relief*, No. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976) 4, 8

United States v. Microsoft Corp., 147 F.3d 935 (C.A.D.C. 1998) 14, 15, 16

United States v. Oregon Medical Society, 343 U.S. 326 (1952) 24

United States v. Western Elec., 894 F.2d 430 (C.A.D.C. 1990) 14

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 23

Wainwright v. Sykes, 433 U.S. 72 (1977) 22

United States Constitution:

Fifth Amendment 1

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1651 2

28 U.S.C. § 1651(a) 12

28 U.S.C. § 1927 ..... *passim*

28 U.S.C. § 2106 ..... 2, 27, 28

28 U.S.C. § 2201(a) 2, 12

Rules:

Fed. R. Civ. P. 52(a) 23

Supreme Court Rule 13 1

Other Authority:

H.R. 96-1234, 96th Congress, 1980, reprinted in USCCAN, Vol. 3, 2712 (1980) 20

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals issued on March 29, 2000, vacating and remanding the District Court's preliminary injunction and declaratory judgment is reported at 207 F.3d 1288, and attached at Appendix A, *infra*, pp. 1a-30a. The decision of the District Court for the Middle District of Alabama is reported at 996 F. Supp. 1130, and attached at Appendix B, *infra*, pp. 31a-98a.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioners' Petitions for Rehearing En Banc and for Rehearing is unreported and was entered on December 14, 2000. (Appendix, *infra*, pp. 99a-101a). This Petition for Writ of Certiorari is timely filed within the ninety days provided by Supreme Court Rule 13.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The All Writs Act, 28 U.S.C. § 1651:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a):

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined

> in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

I. Proceedings in the District Court

The District Court's opinion provides a detailed factual history of this long-standing lawsuit, which can only briefly be summarized herein. *See Reynolds v. ALDOT*, 996 F. Supp. 1130, 1132-1151 (M.D. Ala. 1998).

A. *The Reynolds/Frazer Litigation*

The *Reynolds* Plaintiffs, a class of black employees of the Alabama Department of Transportation ("ALDOT"), filed suit under Title VII in May of 1985, seeking relief from discriminatory employment practices. Plaintiffs alleged, and the District Court ultimately found, that ALDOT had manipulated and circumvented employment procedures so as to avoid hiring or promoting black employees. ALDOT was systematically excluding qualified black employees from higher positions such as Graduate Civil Engineer, by imposing arbitrary and inconsistent requirements on black applicants and delaying the processing of applications filed by black employees such that black employees were not on the job register from which vacancies were filled. When black employees finally had made their way onto the job register, ALDOT bypassed the register and began to follow instead a closed and noncompetitive system of hiring and promotion, under which positions were awarded among employees without ever being opened to black applicants. *Reynolds*, 996 F. Supp. at 1134-36. Evidence was presented that ALDOT had neither posted job announcements

nor received applications in certain job categories for as long as seven years. *Id.* at 1136.

On July 31, 1992, *Reynolds* was consolidated with on-going proceedings against racial discrimination in employment opportunities at various Alabama state agencies, including ALDOT, in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), *aff'd*, sub nom. *NAACP v. Allen*, 493 F.2d 614 (CA5 1974), *further relief*, No. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976) ("*Frazer*").[1] The *Frazer* court already had repeatedly enjoined ALDOT's discriminatory employment practices, *see* 317 F. Supp. at 1090-91, 1976 WL 729 at *6-*8, and specifically found that ALDOT had, for over six years, "generally avoided compliance with the decrees in this case" by various manipulations of state employment procedures. *Id.* at *4.

Although the *Reynolds* Plaintiffs were third party beneficiaries of the injunctive relief earlier entered in *Frazer*, they continued to suffer the very same unlawful discriminatory practices. Over the twenty years following the *Frazer* injunctions, ALDOT continued to "preclude black applicants from applying for the historically white job classifications for prolonged periods," by refusing "to permit applications for years at a time while the existing register used to fill vacancies was either all-white or predominantly white," and by instituting "a battery of new screening criteria and examinations" when the "predominantly white" register had been exhausted. *Reynolds*, 996 F. Supp. at 1134-35.

During the course of the *Reynolds* litigation, Plaintiffs and ALDOT reached a partial settlement of the employment discrimination claims. *Id.* at 1136. This settlement agreement was presented to the District Court for approval. *Id.* A group of

---

1. The United States instituted the *Frazer* litigation in 1968 against the State Personnel Department and six other State agencies. In 1973, the United States added ALDOT (known then as the Highway Department) and all remaining State agencies, except for the Department of Public Safety, as defendants to the *Frazer* litigation.

non-black employees (referred to as the Adams intervenors; "Intervenors" herein) were allowed to intervene for the limited purpose of challenging any race-conscious provisions of the settlement.[2] *Reynolds v. Roberts*, 846 F. Supp. 948, 954 n.8 (M.D. Ala. 1994). After a fairness hearing, the settlement agreement was divided into three parts. R6-513; R6-514; R6-552. On March 16, 1994, the District Court approved Consent Decree I (the "Consent Decree"),[3] which consisted of several articles detailing class wide, race-neutral declaratory and injunctive relief. Pet. App. D, pp. 102a-164a. The parties expressly agreed that it was their "intent and purpose . . . to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may . . . otherwise discriminate against the plaintiffs and the class they represent." Pet. App. D, p. 158a. ALDOT was required to establish, "in a timely manner, new, non-discriminatory personnel procedures that would allow African-Americans and all other employees to compete for positions, openly and fairly, without regard to race." *Reynolds*, 996 F. Supp. at 1136-37. The Consent Decree further set out specific requirements for hiring and promotion that were intended to "significantly restrict any opportunity for the Transportation Department to manipulate and circumvent personnel procedures in the future so as to avoid the hiring and promotion of African-Americans." *Id.* at 1137.

---

2. The Adams intervenors did not object to or appeal the limited scope of intervention. In 1998, the Court granted class certification to the Adams intervenors "limited to the purpose of their intervention – to challenge the race-conscious provisions of the proposed consent decree." R21-2612.

3. The Adams Intervenors are neither signatories nor parties to Consent Decree; however, they agreed with the District Court that Consent Decree contained only race-neutral relief. R6-552. The other two parts of the settlement remain pending before the District Court with the exception of one provision approved by the District Court on January 23, 1998, which presently is on appeal before the Eleventh Circuit.

Article XIX, ¶ 7 of the Consent Decree required that ALDOT establish an "enhanced complaint procedure," subject to review by Plaintiffs' counsel. Pet. App. D, p. 159a. The procedure first instituted under this Article required that grievances be submitted to the District Court if attempts to resolve the problem by the employee and her supervisor, and by the employee and ALDOT's EO monitor, had failed. Pet. App. N, pp. 259a-262a. After a number of grievances had been submitted to the District Court for resolution, the court ordered Plaintiffs and ALDOT to revise the procedure, which although required under the Consent Decree had not actually been incorporated into the Consent Decree, and thereby remove the court from the grievance process. Pet. App. M. The revised grievance procedure (the "grievance procedure") again required that the employee and supervisor, and then the employee and EEO monitor, attempt to resolve the grievance. Pet. App. L, pp. 244a-248a. If those attempts were not successful, the grievance was to be submitted to a hearing officer, and then, if necessary, to binding arbitration. Pet. App. L, pp. 248a-250a. This revised grievance procedure was approved on August 9, 1995. Pet. App. O.

B. *Proceedings Concerning Unforeseen Abuses of the Grievance Process*

Unanticipated abuses of the grievance process through private, "friendly" settlements between employees and supervisors outside the "open and fair" competitive hiring and promotion procedures required under the Consent Decree, first were brought to the District Court's attention by ALDOT in a January 14, 1997, motion to dismiss the grievances of three white employees (McCullough, D'Arville, and Grant), who had complained that they were working "out of classification" in violation of the Consent Decree. ALDOT was concerned that these employees were about to receive provisional appointments to positions that had not been opened to competition and that such appointments, if they occurred, would violate the Consent Decree. *Reynolds*, 996 F. Supp. at 1137; *see also* Pet. App. K.

The District Court denied ALDOT's motion on the ground that the court had no role at that stage of the grievance procedure, and denied ALDOT's concurrent motion for protective order against being penalized for violation of the Consent Decree as premature. *Id.*

Use of "out of classification" grievances to award similar "friendly" noncompetitive appointments grew rapidly. By February 1997, it had been nearly three years since ALDOT made *any* competitive appointments. *Reynolds v. ALDOT*, 972 F. Supp. 566, 569-70 (M.D. Ala. 1997). Accordingly, on February 13, 1997, Plaintiffs filed a motion for contempt, challenging the "out of classification" assignments at the root of the noncompetitive appointments awarded under the grievance procedure. R16-1542. On February 18, 1997, the District Court ordered ALDOT to show cause why it should not be held in contempt. R16-1552. While the contempt motion was pending, Plaintiffs filed a motion for a temporary restraining order, requesting that the court prevent implementation of the noncompetitive appointments offered to McCullough, D'Arville, and Grant on the ground that those grievance awards would violate the Consent Decree. *Reynolds*, 996 F. Supp. at 1137. The court granted the motion, so as to preserve the *status quo* and prevent irreparable harm until it could decide the larger issue of whether grievances seeking noncompetitive appointments based on out-of-classification assignments violated the Consent Decree. *Id.* That Order subsequently was extended by a preliminary injunction entered April 9, 1997, noting that "the defendants join the plaintiffs in contending that Grant, D'Arville, and McCullough are misusing the grievance process, and thus the defendants agree, in words of defense counsel, that the Court should 'stop the grievance procedure for everyone right here, both black and white.' " Pet. App. G, p. 207a.

On March 20, 1997, ALDOT filed a pleading disclosing that thirty four additional grievances similar to the "out of classification" grievances previously filed by McCullough,

D'Arville, and Grant had been filed, and that at least two of those grievances were filed by black employees. Pet. App. J, pp. 226a, 229a n.2. Based on this disclosure, Plaintiffs filed a motion for temporary restraining order and preliminary injunction seeking to enjoin all sixteen of the grievances, including those filed by black employees. Pet. App. I, pp. 217a. Because an agreement was entered between Plaintiffs, the Adams Intervenors, and ALDOT which stayed processing of *all* "out of classification" grievances – whether filed by black or white employees – if they sought appointment or reclassification to positions that had not been opened to competition, the court did not enter a temporary restraining order, but instead scheduled the motions for hearing. Pet. App. H.

After seven days of hearings, on March 3, 1998, the District Court granted declaratory relief, finding that use of the grievance procedure to award "friendly," noncompetitive appointments perpetuated practices forbidden by the Consent Decree and condemned by *Frazer*. *See Reynolds*, 996 F. Supp. at 1151-52. Although neither ALDOT nor the Adams Intervenors had raised the issue of whether Plaintiffs' motions should have been framed in terms of contempt, the District Court, out of an abundance of caution, gave ALDOT fourteen days to "note an objection" and request that "these proceedings be recast as civil contempt proceedings."[4] *Id.* at 1155-56. Neither ALDOT nor the Intervenors noted any objection.[5]

---

4. The District Court also stated that entering only declaratory relief at this time would serve as a valuable tool for focusing the issues if the proceedings were eventually recast as contempt. *Reynolds*, 996 F. Supp. at 1155.

5. On January 31, 2000, the District Court ruled on Plaintiffs' 1997 motion for contempt and held, pursuant to ALDOT's express stipulation, that ALDOT had violated the Consent Decree. *Reynolds v. ALDOT*, 84 F. Supp. 2d 1339, 1351 (M.D. Ala. 2000).

II. Proceedings in the Court of Appeals

This case came before the Eleventh Circuit on appeal of the District Court's preliminary injunction of April 9, 1997, and declaratory judgment entered on March 3, 1998. ALDOT subsequently dismissed its appeals, and the Intervenors' appeals were consolidated, for the purposes of briefing, with yet another appeal filed by ALDOT and the Intervenors, as well as the cross-appeal by Plaintiffs. Due to the court's page number limitations, Plaintiffs were able to address issues raised by the injunction and declaratory judgment concerning unforeseen and improper uses of the grievance procedure in only six of eighty pages. No party briefed or argued the issue of whether Plaintiffs were limited procedurally to a motion for order to show cause why ALDOT should not be held in contempt, and no party challenged the District Court's authority to issue a declaratory judgment. Likewise, whether Plaintiffs' counsel had conducted himself improperly under 28 U.S.C. § 1927 in the court below was not briefed or raised at oral argument.[6]

Nonetheless, the Eleventh Circuit vacated the District Court's preliminary injunction and declaratory judgment on the ground that the District Court properly could have proceeded only by holding a "show cause" hearing and finding ALDOT in contempt. *Reynolds*, 207 F.3d at 1298-99. The Eleventh Circuit further indicated, in direct opposition to the District Court's findings of fact, that Plaintiffs were not injured by uses of the grievance procedure to award noncompetitive appointments, and that both the District Court and Plaintiffs' counsel sought to preclude only grievance awards to non-black employees.

---

6. There was a single question at oral argument concerning the procedural propriety of Plaintiffs' motions for injunctive relief, rather than a motion for order to show cause why ALDOT should not be held in contempt. Upon instruction from the Eleventh Circuit panel, Plaintiffs' counsel submitted in letter form substantial authority for the proposition that a court may implement the purpose of a consent decree through means other than contempt.

Id. at 1299-1300.[7] Because, in the Eleventh Circuit's view, Plaintiffs' counsel sought to preclude only non-black grievances in the absence of injury to the Plaintiff class, the Eleventh Circuit held that counsel's conduct in the District Court amounted to a sanctionable abuse of judicial process. *Id.* Finally, the Eleventh Circuit instructed the District Court to "restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised [Grievance] Procedure."[8] *Id.* at 1302. On March 29, 2000, when the Eleventh Circuit issued this Order, returning the case to the status quo ante meant obliterating over 3500 docket entries and nullifying scores of District Court orders which had not been the subject of any appeal.

The present Petition for Writ of Certiorari is directed toward the Eleventh Circuit's holding that contempt proceedings are the only means by which a district court may address problems that arise in continuing implementation of consent decrees meant to address long-standing patterns and practices of racial discrimination; the Eleventh Circuit's unwarranted and unsupported finding, in the complete absence of due process, that Plaintiffs' counsel engaged in sanctionable conduct by attempting to stop discriminatory employment practices in his representation of the *Reynolds* class; and the Eleventh Circuit's intemperate disregard of the District Court's findings of fact, in going so far as to make its own factual determinations and purporting to nullify almost five years of District Court proceedings.

---

7. *But See Reynolds*, 996 F. Supp. at 1152; Pet. App. I (Plaintiffs seeking to enjoin grievances brought by both black and white employees that would result in an abuse of the grievance procedure).

8. The District Court's August 9, 1995 Order merely approved the revised grievance procedure. It did not purport to amend the Consent Decree. Pet. App. O.

REASONS FOR GRANTING THE WRIT

Compelling reasons for granting this petition for certiorari include the need to resolve a conflict among the circuits regarding the means by which a court may ensure that a consent decree achieves its intended remedial purpose, and the scope of due process rights in connection with imposition of sanctions pursuant to 28 U.S.C. § 1927. This Court's review further is warranted because the Eleventh Circuit panel departed from the accepted course of judicial process, making its own factual determinations grounded in its own construction of record evidence and purporting to nullify district court judgments that were not before it.

This case presents important questions concerning: (1) the conflict between the Circuit Courts of Appeals regarding a district court's authority to invoke its equitable powers in effectuating the purpose of a remedial consent decree over which it has jurisdiction; (2) constitutional limits on the scope of an appellate court's authority to impose sanctions pursuant to 28 U.S.C. § 1927 for conduct in the district court below; and (3) the limits of appellate jurisdiction with respect to district court orders which have not been appealed.

I. The Eleventh Circuit's Holding That the Authority of the District Court To Oversee the Consent Decree Is Limited to Its Contempt Power Conflicts with Federal Law.

A writ of certiorari should be granted so that this Court can reconcile the conflict between the Eleventh Circuit's holding and that of other Courts of Appeals regarding the methods by which district courts may resolve controversies concerning remedial consent decrees. The Eleventh Circuit, relying on its earlier precedent, *Newman v. Alabama*, 683 F.2d 1312 (CA11 1982), and in direct conflict with other decisions of the federal Courts of Appeal and statutory law, held that district courts could address problems arising in implementation of consent decrees only through contempt proceedings and,

accordingly, that the District Court below did not have the power to enter its preliminary injunction and declaratory judgment.

A. *The District Court Did Not Abuse Its Discretion in Granting Both the Preliminary Injunction and the Declaratory Judgment.*

Contrary to the Eleventh Circuit's holding, *Reynolds*, 207 F.3d at 1298-99, the District Court was not constrained to defer determination of the issues raised by the parties about the unforeseen uses of the grievance procedure until Plaintiffs filed a motion for order to show cause why ALDOT should not be held in contempt. It is well-settled that a district court has inherent power to issue a declaratory judgment or other remedy specially tailored to the facts and circumstances before the court. *See, e.g., Berger v. Heckler*, 771 F.2d 1556, 1568-69 (CA2 1985) (federal court's interest in orderly and expeditious enforcement of its decree "justifie[d] any reasonable action taken by the court to secure compliance with its orders"); *Gates v. Collier*, 616 F.2d 1268, 1271 (CA5 1980) ("the court may use any of the weapons generally at its disposal to ensure compliance" with a consent decree). The All Writs Act, 28 U.S.C. § 1651(a), provides that a federal court may "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Declaratory Judgment Act, 28 U.S.C. § 2201(a), further provides that a district court's declaration of "the rights of a interested party" is appropriate even where other avenues of relief may be available. *See also Powell v. McCormack*, 395 U.S. 486, 499 (1969) (court may grant declaratory relief even though other forms of relief also may be appropriate).

As this Court and the First, Second, Third, Fourth, and Fifth Circuit Courts of Appeals have held, the fact that a district court has not made a finding of contempt does not preclude the court's exercise of equitable powers in furthering the remedial purpose of a consent decree, especially where, as here, the consent decree itself provides that the district court "retains jurisdiction to decide any and all questions which arise under this Decree . . ."

Consent Decree, Article 19, ¶ 10; Pet. App. D, p. 160a. *See also In re Pearson*, 990 F.2d 653, 658 (CA1 1993) (court's "ongoing supervisory responsibility" with regard to consent decrees "carries with it a certain correlative discretion") (citing *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 648 (1961)). In rejecting the contention that a district court lacks authority to impose remedies "absent a finding of contempt," the Fourth Circuit aptly has stated that "words are possessed of no magical properties, incantations should not decide cases, and the lack of a finding of contempt or of bad faith should not preclude exercise of inherent equitable powers to achieve fair remedial results." *Alexander v. Hill*, 707 F.2d 780, 783 (CA4 1983). *See also Berger*, 771 F.2d at 1569 ("Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt."); *Brewster v. Dukakis*, 675 F.2d 1, 3-4 (CA1 1982) (court's power to interpret a consent decree, where "clarity of obligation necessary for enforcement through contempt has not yet been established," includes a "limited injunctive power . . . when . . . unforeseen circumstances have required interpretation of the decree").

Likewise, the propriety of declaratory relief does not depend upon whether contempt has been sought or is available, but rather "depends on whether there is a live dispute between the parties." *Powell*, 395 U.S. at 518 (citing *Golden v. Zwickler*, 394 U.S. 103 (1969)). Settlement of controversies, such as that over unforeseen applications of the grievance procedure here at issue, "before they ripen into violations of law or some breach of contractual duty is a fundamental purpose of the Declaratory Judgment Act." *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989, 990 (CA5 1952) (citation and punctuation omitted). *See also Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 560 (CA3 1997) ("parties have the prerogative to seek only a declaratory judgment even though the party . . . could have . . . asked for coercive relief.").

A district court has great latitude to choose remedies appropriate to the particular circumstances of a Title VII

employment discrimination case. It is well-settled that district courts are vested with broad and flexible equitable powers in effectuating remedial consent decrees intended to address statutory and constitutional violations of individual rights by public institutions such as prisons, schools, and other state employers. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378-83 (1992). *See also Teamsters v. United States*, 431 U.S. 324, 364-65 (1977) (federal courts have broad equitable powers in Title VII cases "to make possible the fashioning of the most complete relief possible") (citation and punctuation omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777-78 (1976) (Title VII injunctive relief "must not be confined within narrow canons for equitable relief deemed suitable . . . in ordinary private controversies" and holding that the federal courts have "broad equitable discretion" in such cases) (citation and punctuation omitted).

The District Court appropriately exercised its broad equitable discretion in responding to the parties' concerns about unforeseen uses of the grievance procedure by issuing a preliminary injunction barring implementation of noncompetitive appointments that violated the intent of the Consent Decree. A district court's power to enforce a consent decree includes the power to issue such injunctions for the purpose of preventing further discriminatory actions. *See, e.g., United States v. Microsoft Corp.*, 147 F.3d 935, 943 (CAD.C. 1998) (an injunction, rather than contempt proceedings, can be used to address the contention that a consent decree, properly construed, bars the conduct at issue); *United States v. Western Elec.*, 894 F.2d 430, 434 (CAD.C 1990) ("A district court may adjust the obligations of the parties in response to unforeseen changes in circumstances, *see United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (citations omitted), or in response to anticipated changes expressly identified by the parties upon entering the decree, *see, e.g., United States v. American Cyanamid Co.*, 719 F.2d 558, 564-65 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) (citations omitted)");

Smith v. Miller, 665 F.2d 172, 175-76 (7th Cir. 1981) (affirming district court's exercise of equitable power in effectuating the purposes of federal law).

Likewise, the District Court's decision to enter a declaratory judgment was an appropriate means of avoiding further discrimination and potential contempt by apprising the parties of their rights under the Consent Decree. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (acknowledging that clarification was appropriate means of addressing problems with consent decree and criticizing defendants for failing to petition the district court for a clarification); *Microsoft Corp.*, 147 F.3d at 942-43 (by granting clarification, the court "construed the petition to contain an implicit request for declaratory relief").

B. *Contempt Proceedings Would Have Been Inappropriate Under the Circumstances of this Case.*

In any circumstance, because the *Reynolds* District Court was faced with a situation that could *not* effectively be addressed through civil contempt proceedings, the strictures retroactively imposed by the Eleventh Circuit were inapposite. Because the noncompetitive appointments obtained through unforeseen uses of the grievance procedure had not yet been implemented, ALDOT's potential contempt was not yet ripe. Moreover, because the grievance procedure was not actually part of the Consent Decree, use of the grievance procedure to obtain those appointments arguably would not have violated a specific express term of the Consent Decree, but rather would have circumvented the terms of the Consent Decree and thereby frustrated its purpose. *See Reynolds v. ALDOT*, 996 F. Supp. at 1132, 1137-38 ("use of the grievance process in this manner perpetuates practices forbidden by Consent Decree I" and "defeats a primary goal of the consent decree"). The District Court could not properly have found ALDOT in contempt without clear and convincing evidence that an express provision of the Consent Decree unambiguously had been violated. *See Jove Engineering Inc.*, 92 F.3d 1539, 1545-46 (CA11 1996)

(finding of contempt requires clear and convincing evidence that the underlying order has been violated); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (CA2 1995) (resorting to contempt is not proper when there is doubt as to the wrongful nature of a defendant's conduct). *See also Microsoft Corp.*, 147 F.3d at 943 (finding contempt inappropriate in the absence of a finding that conduct was unambiguously barred by the consent decree); *Gregory v. Depte*, 896 F.2d 31, 37 (CA3 1990) (Becker, J., concurring) ("if the underlying order has yet to be violated, then what purports to be a contempt sanction is more correctly treated as a declaratory judgment").

Holding ALDOT in contempt as a means of addressing unforeseen uses of the grievance procedure to award noncompetitive appointments contrary to the intent of the Consent Decree would have been especially inappropriate in light of the fact that ALDOT itself "first brought to the attention of the court the matter of whether certain employees and supervisors were entering into improper grievance settlements." *Reynolds*, 996 F. Supp. at 1155. The District Court entered a preliminary injunction to forestall potentially improper appointments until it could address the issue whether such awards under the grievance procedure vitiated the Consent Decree's competitive appointment requirements in response to *both* parties' concerns. *Id.* at 1137; Pet. App. G, 207a. Given that both Plaintiffs and ALDOT had requested clarification, a declaratory judgment ultimately was the most effective and least pejorative way to address unforeseen uses of the grievance procedure to effect discriminatory, noncompetitive appointments.

II. The Eleventh Circuit Denied Plaintiffs' Counsel Fundamental Due Process When It Held That Counsel's Conduct Was Abusive and Required Plaintiffs' Counsel to Show Cause As to Why Section 1927 Sanctions Should Not Be Imposed.

A writ of certiorari should be granted to review the Eleventh Circuit's failure to accord Plaintiffs' counsel fundamental due process rights with respect to the court's determination that counsel had engaged in abusive conduct implicating sanctions under 28 U.S.C. § 1927, which penalizes "unreasonable and vexatious multiplication of proceedings."[9] Sanctions appropriately are imposed under Section 1927 only after notice to counsel and opportunity for counsel to be heard on the issue of allegedly sanctionable conduct. *Roadway Express v. Piper*, 447 U.S. 752, 767 (1980). In spite of this constitutional mandate, and although neither Defendants, nor Intervenors, nor the District Court had raised any issue of sanctionable behavior, the Eleventh Circuit spontaneously considered whether Plaintiffs' counsel should be sanctioned under Section 1927 for conduct in the District Court below and required that counsel show cause before a district court, *other than the one before which the allegedly sanctionable conduct had occurred*, as to why his conduct should not be sanctioned. *Reynolds*, 207 F.3d at 1299. Without the benefit of briefing or citation to the record, and without providing counsel even the most rudimentary due process, the Eleventh Circuit made the factual finding that counsel had invited error, abused judicial process, and asserted baseless arguments in connection with the Plaintiffs' request for a preliminary injunction barring implementation of noncompetitive appointments. *Reynolds*, 207 F.3d at 1299. By this holding, the Eleventh Circuit court exceeded the scope of its appellate authority and entirely disregarded both due process and the appropriate standard for imposing sanctions under Section 1927.

---

9. Section 1927 provides that an attorney may be required to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred" because of counsel's unreasonable and vexatious multiplication of proceedings. 28 U.S.C. § 1927.

A. *The Eleventh Circuit Exceeded the Scope of Its Authority in Finding That Plaintiffs' Counsel Abused Judicial Process.*

After hearing arguments and receiving briefs on the Intervenors' appeal of the District Court's injunction and declaratory judgment, the Eleventh Circuit, on its own initiative, considered the extraneous matter of Plaintiffs' counsel's conduct in the District Court litigation preceding the Intervenors' appeal, and made the factual determination that Plaintiffs' counsel had acted improperly. Because none of the parties had briefed, argued, or even anticipated this issue, the Eleventh Circuit's startling decision necessarily was based on an incomplete record and, as it happened, a flawed understanding of facts found by the District Court and the procedural history in the District Court. The appellate court did not have the authority to make findings of fact with regard to behavior that occurred before the District Court, but rather was required to defer to the District Court's factual determinations. *See infra*, section III. A. The District Court has never raised the issue of sanctions under Section 1927 and has never disputed the propriety of Plaintiffs' counsel's conduct. *Cf. Reynolds*, 207 F.3d at 1302 (Story, J., dissenting in part) (discussing Plaintiffs' counsel's "legitimate concern" regarding violation of the Consent Decree and acknowledging that the "district court apparently shared those concerns").

Section 1927 is not a "catch-all" provision for conduct that a court deems objectionable. *See Peterson v. BMI Refractories*, 124 F.3d 1386, 1395-96 (CA11 1997) ("[T]he provisions of Section 1927, being penal in nature, must be strictly construed.") A Court of Appeals is authorized to find that counsel's conduct warrants imposition of sanctions under Section 1927, only after making specific findings concerning conduct that occurred before that court. *See, e.g., Braley v. Campbell*, 832 F.2d 1504, 1513 (CA10 1987) (listing cases in which appellate courts imposed sanctions for frivolous and vexatious appeals); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809

F.2d 626, 638 (CA9 1987) (evaluating the substance of the appeal); *Limerick v. Greenwald*, 749 F.2d 97, 102 (CA1 1984) (appeal itself was frivolous and vexatious). Section 1927 sanctions must be based on express, particularized findings concerning counsel's conduct. *See, e.g., Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718-19 (CA8 1999) (discussing need for findings of fact in support of a determination of sanctionable conduct); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (CA2 1997) (court must provide counsel facing sanctions under Section 1927 with "specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed"); *Braley*, 832 F.2d at 1513 (indicating that there must be an "express basis for imposition" of Section 1927 sanctions). *See also Edwards v. General Motors Corp.*, 153 F.3d 242, 246 (CA5 1998) (sanctions under Section 1927 must be "predicated on actions that are both 'unreasonable' and 'vexatious' . . . [and] evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court.") (citation omitted); *Avirgan v. Hull*, 932 F.2d 1572, 1582 (CA11 1991) (sanctions for willful abuse of judicial process are appropriate only upon finding conduct tantamount to bad faith).

The Eleventh Circuit's findings relate primarily to its view of conduct that occurred before the District Court. The Eleventh Circuit held that counsel's conduct in the District Court below constituted abuse of judicial process and invitation to error (later defended, the court suggested, by baseless argument). *Reynolds*, 207 F.3d at 1299. The findings that the Court proffered as a basis for its holding were based on an inaccurate reading of the record and, in any circumstances, were beyond the Eleventh Circuit's authority, as they concerned conduct which occurred before the District Court and which had not been raised by any of the parties or the District Court.

B. *The Eleventh Circuit Violated Counsel's Constitutional Rights by Finding That Counsel Had Engaged in Sanctionable Conduct without Affording Counsel Even the Most Basic Due Process.*

Plaintiffs' counsel first became aware that his conduct was alleged to be improper only upon reading the Eleventh Circuit's opinion, which not only raised the issue of counsel's conduct on its own initiative, but also actually *held* that counsel's conduct had been improper. The Court's failure to provide counsel with notice and an opportunity to be heard on the issue of sanctionable conduct violated counsel's constitutional right to due process.

The fundamental elements of due process entail (1) notice that the court is considering the issue of sanctions, and (2) an opportunity to respond to the court's concerns.[10] *See Braley*, 832 F.2d at 1514. *See also Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1991); *Roadway Express*, 447 U.S. at 767; *Thornton v. General Motors Corp.*, 136 F.3d 450, 455 (CA5 1998); *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (CA7 1997); *Sakon v. Andreo*, 119 F.3d 109, 114 (CA2 1997). To satisfy due process requirements, notice must be sufficiently "particularized . . . that a party is aware of the particular factors that he must address if he is to avoid sanctions." *Angelino v. N.Y. Times Co.*, 200 F.3d 73, 100 (CA3 1999) (citation and punctuation omitted). *See also 60 East 80th St. Equities v. Sapir* (*In re 60 East 80th Street Equities*), 218 F.3d 109, 118 (CA2 2000) (finding that repeated express warnings from the bench constituted "reasonable and adequate" notice, but indicating that advance written notice of the possibility of sanctions is "ordinarily . . . preferable").

Plaintiffs' counsel received absolutely no notice that the Eleventh Circuit would consider whether counsel's conduct was

---

10. In discussing an amendment to Section 1927, Congress in 1980 expressly indicated that an attorney facing potential sanctions under Section 1927 was entitled to the protections of due process. *See* H.R. 96-1234, 96th Congress, 1980, reprinted in USCCAN, Vol. 3, 2712, 2780 (1980).

subject to sanctions under Section 1927. Counsel never had an opportunity to address the factual misapprehensions on which the court's determination that counsel had engaged in culpable conduct was based,[11] and has not yet been afforded any opportunity to dispute or otherwise respond to the Eleventh Circuit's "findings." Counsel was denied even the most basic due process rights. That Plaintiffs' counsel *prevailed* before the District Court further compounds this wrong.

Furthermore, by remanding the issue of whether sanctions should be imposed to a district court other than the *Reynolds* District Court, before which the allegedly improper conduct occurred, the Eleventh Circuit placed the district court to which the matter was remanded in the untenable position of determining appropriate sanctions on the basis of the Eleventh Circuit's findings, which the Court lacked authority to make and which manifestly are not supported by the record. The district court to which the Section 1927 issues were remanded has indicated that it will proceed "against this background and these findings," *i.e.* — that the Eleventh Circuit's findings that Plaintiffs' counsel inappropriately sought

---

11. For example, the Eleventh Circuit wrongly stated that Plaintiffs failed to move for contempt, *Reynolds*, 207 F.3d at 1298, when Plaintiffs *had* first moved for contempt and only moved for the preliminary injunction at issue to prevent implementation of noncompetitive appointments that violated the purpose of the Consent Decree. *See Reynolds*, 84 F. Supp.2d at 1341 (discussing Plaintiffs' 1997 motion for civil contempt). The Circuit Court also repeatedly stated that the District Court granted, at Plaintiffs' behest, an injunction barring only white employees from using the grievance procedure. *Reynolds*, 207 F.3d at 1294 n.4, 1296-1300. In fact, the District Court enjoined implementation of noncompetitive appointments in grievances filed by both white and black ALDOT employees. *See Reynolds*, 996 F. Supp. at 1151-1156. In a further departure from the record, the Eleventh Circuit relied heavily on the notion that there was no finding of injury to the Plaintiff class, *Reynolds*, 207 F.3d at 1299, in the face of the District Court's express finding, based on extensive record evidence, that the Plaintiff class both was and would be injured by implementation of the grievance awards at issue. *See Reynolds*, 996 F. Supp. at 1152.

injunctive relief by falsely claiming that the grievance procedure violated the consent decree, invited error by requesting such injunctive relief, "were actually representing no one but themselves," and "attempted to defend the district court's ruling on appeal with baseless arguments," are binding in future proceedings. Pet. App. F.

Plaintiffs' counsel thus faces a mandatory show cause hearing, to be conducted on the basis of the Eleventh Circuit's unsolicited determination that counsel engaged in abusive behavior before the *Reynolds* District Court, without the benefit of the due process protections to which he constitutionally is entitled. Counsel was not provided notice that he was charged with inviting error, abusing judicial process, or asserting baseless claims, much less with unreasonably and vexatiously multiplying proceedings, and had no opportunity to be heard on the issue of whether his behavior was culpable.

III. The Eleventh Circuit Exceeded Its Authority by Disregarding the District Court's Factual Findings.

The Eleventh Circuit strayed far from the proper course of judicial proceedings in reversing the *Reynolds* decision on the basis of the Court's own construction of the record. *See Reynolds*, 207 F.3d at 1302. Courts of Appeal are bound to defer to the construction of record evidence that supports the trial court's judgment. *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (citing *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). The *Reynolds* District Court provided injunctive and declaratory relief on the basis of specific findings, grounded in substantial documentary and testimonial evidence, that the Plaintiff class would be injured by implementation of noncompetitive appointments awarded under the grievance procedure. *See Reynolds*, 996 F. Supp. at 1152. Nonetheless, the Eleventh Circuit Court did not defer to the District Court's particularized findings of fact, but rather relied on its own assumptions about the evidence in the record to hold that the District Court should have granted neither an injunction nor a

declaratory judgment. This Court should grant a writ of certiorari to clarify the limits of appellate authority to engage in fact-finding.

A. *The Eleventh Circuit Did Not Grant the Requisite Deference to the District Court's Findings of Fact.*

Appellate courts have very limited fact-finding jurisdiction and are authorized only to determine whether factual findings made by district courts are "clearly erroneous." *See* Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 574; *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975). An appellate court is *not* empowered to consider whether, based on the record evidence, it would have made the same factual determination as did the court below: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *See Anderson*, 470 U.S. at 573-74 (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844 (1982)) (finding that the Eleventh Circuit misapprehended and misapplied the clearly erroneous standard when it held that the district court erred in finding discrimination on the basis of gender).

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 574-75.

This Court repeatedly has indicated that appellate courts must apply a deferential standard of review to factual findings

by district courts. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-401 (1990) (O'Connor, J.) (requiring appellate court to apply deferential standard because trial court's decision to impose Rule 11 sanctions involved findings of fact); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (Rehnquist, J.) ("Court of Appeals was mistaken" when it made factual determinations and should instead have remanded so the district court could make additional findings or set aside the district court's findings as "clearly erroneous") (quoting *Anderson*, 470 U.S. at 574-75); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (Rehnquist, J.) (federal habeas corpus statute does not give appellate courts license to redetermine the factual matter of credibility of witnesses) (citing *United States v. Oregon Medical Society*, 343 U.S. 326 (1952)). Likewise, federal courts of appeal have acknowledged the deference due a district court's findings of fact. *See, e.g., Green v. School Bd. of Hillsborough County*, 25 F.3d 974, 977 (CA11 1994) (giving "substantial deference" to district court's factual decisions in Title VII disparate treatment suit); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (CA7 1991) (district court's decision regarding "selection of the appropriate variables . . . is generally a question of fact and is reversible only if clearly erroneous"); *Bundy v. Jackson*, 641 F.2d 934, 950 (CAD.C. 1981) ("we must affirm the trial court's conclusion on the question of discrimination if the so-called 'subsidiary facts' are not clearly erroneous, if the inferences drawn from them are reasonable, and if the findings and inferences reasonably support the 'ultimate' factual finding on discrimination").

The Eleventh Circuit Court disregarded the District Court's factual determination that the Plaintiff class would suffer injury in the absence of injunctive relief, *see Reynolds*, 996 F. Supp. at 1152, and substituted its own finding that implementation of the challenged grievance recommendations would have "injured no member of a plaintiff class on account of race or in any other way." *Reynolds*, 207 F.3d at 1299. The court's ultimate decision to vacate the District Court's preliminary injunction and

declaratory judgment stems from its own "redetermination" of the facts. This failure either to defer to the trial court's findings of fact or to set aside those findings as "clearly erroneous," justifies granting of a writ of certiorari.

B. *The District Court Relied on Substantial Record Evidence to Find That the Plaintiff Class Would Be Injured by Implementation of Noncompetitive Appointments Through the Grievance Procedure.*

The record demonstrates not only that the District Court found injury to the Plaintiff class, but also that the findings of injury were based on substantial evidence. Plaintiffs established injuries to individual class members (including Plaintiff Reynolds) who were denied an opportunity to compete for jobs, through stipulations of fact, R142-204-205; R137-682-687; R141-186-190, 196-197, and through the testimony of seven class members and a top official of ALDOT. *See, e.g.,* R134-72; R135-301-305; R136-486-492, 562-73, 588-89, 595-96, 617-25, 646-48, 635-36; R135-234-38, 282-83. The Intervenors who brought the appeal on which the Eleventh Circuit ruled did not contest that the Plaintiff class was adversely affected. *See Reynolds*, 996 F. Supp. at 1152; R134-72, R137-682-685; R142-204-205.

In spite of the District Court's findings, which were amply supported by the record, the Eleventh Circuit presumed that the District Court had intended to prohibit only *white* employees' use of the grievance procedure. *Reynolds,* 207 F.3d at 1297. Accordingly, the court opted to "treat" the declaratory judgment as barring only "non-black" uses of the grievance procedure. *Id.* The court bolstered its presumption with the mistaken belief that the trial court was concerned only with possible injury to class members "at some unforeseen time in the future," and further peremptorily stated that "it follows inexorably that, in the court's view, allowing *any* non-black to invoke the grievance procedure – even if it caused a plaintiff class member no injury – would violate the decree." *Reynolds*, 207 F.3d at 1297 n.18. The record shows, however, that the District Court found both

that class members were *currently injured* by unforeseen uses of the grievance procedure and that class members would suffer irreparable harm if those uses were allowed to continue. *See Reynolds*, 996 F. Supp. at 1149, 1152. The District Court heard and expressly rejected the contention that black grievants were allowed to obtain noncompetitive appointments through the grievance procedure at issue,[12] *see id.* at 1149, and enjoined grievances seeking noncompetitive appointments whether brought by white or black employees. *Id.*; R18-1726; R141-4, 62-64.

The Eleventh Circuit's mistaken interpretation of the voluminous record led the court to assume that the District Court had modified the Consent Decree – "rewrit[ing] the contract" so as to deny a race-neutral benefit to all but black employees. *Reynolds*, 207 F.3d at 1297 n.18, 1300. The court stressed that it considered the Consent Decree as a contract that should be construed using "the normal tools for interpreting contracts," *id.* at 1300, and then, on the erroneous basis that the grievance procedure was a part of the Consent Decree, concluded that the District Court had no right to alter an unambiguous term of the contract. *Id.* at 1301. However, as explained above, while the Consent Decree indicated that a grievance procedure would be established, a particular procedure was not incorporated into the decree. The District Court thus did not amend or rewrite the Consent Decree by declaring that use of the grievance procedure to obtain noncompetitive appointments circumvented the intent

---

12. The Hinton and Sims grievances referenced by the court were brought under a procedure predating that here at issue and included findings of racial discrimination. *See* R20-2475-39-43; R12-1200-34; R11-1091; R14-1427; *see also* R10-1034; R11-1086, 1091; R12-1212; R14-1427; R15-1512; R6-599A; R12-1200, 1231, 1241, 1282, 1285; R13-1294, 1299. The language cited by the court, *Reynolds*, 207 F.3d 1295, n. 10, to support its conclusion that resolution of the Sims grievance was not based on findings of racial discrimination came from a secondary proceeding focused on the defendants' "hiring freeze" defense – after a prior hearing found discrimination on the basis of race.

of the Consent Decree. Construing the grievance procedure to insure that it was consistent with the spirit of the Consent Decree thus did not alter the Consent Decree itself.

The Eleventh Circuit further disregarded the District Court's findings by concluding, on the basis of its own assumptions about the evidence, that the District Court had established disparate standards for "black" and "non-black" grievants. The source of this apparent hostility to the Consent Decree here at issue, and to the District Court's declaratory judgment that a particular use of the grievance procedure violated that decree, is difficult to discern. The District Court did *not* establish disparate standards on the basis of race, but simply made the race-neutral declaration that *certain unforeseen uses* of the grievance procedure perpetuated noncompetitive job selection in violation of the Consent Decree. *See Reynolds*, 996 F. Supp. at 1140-41. The Consent Decree itself was race-neutral, and altogether avoided use of quotas and race-based preferences. The "black" / "non-black" distinction upon which the Eleventh Circuit so heavily relied stems from the way the court opted to "treat" the judgment, rather than the judgment itself.

IV. The Eleventh Circuit Exceeded Its Authority Under 28 U.S.C. § 2106 by Overruling Orders Which Were Not Before the Court.

The Eleventh Circuit further overstepped its appellate authority by overruling district court judgments which had not been appealed and by directing that orders which were not properly before the Court should be nullified, instructing the District Court "to restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995 . . ."[13] *Reynolds*, 207 F.3d at 1302. An appellate court's authority

13. August 9, 1995, is the date the revised grievance procedure was approved by the District Court. On remand, the District Court has issued an order construing the Eleventh Circuit's reference to "this case" to require that only matters dealing with the particular grievances here at issue be returned to the "status quo ante." *Reynolds v. ALDOT*, (Cont'd)

over proceedings in district courts is set out in 28 U.S.C. § 2106, which provides that

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such *further* proceedings to be had as may be just under the circumstances.

(Emphasis added). The Eleventh Circuit's order vastly exceeds this authority by purporting to direct the District Court to vacate orders that were not before the Eleventh Circuit for review, including orders entered long before the orders which *were* appealed had been issued, without any finding of legal error.

District courts are not the

> creatures and agents of [the appellate courts] whose work [the appellate court] may reject and send back for redoing at [the court's] own pleasure. . . . [An appellate court] cannot . . . "reverse" a judgment of one of the [district courts] "and direct the entry" of a different judgment whenever [the appellate court] disagree[s] with what has been done, but only when [the appellate court] can identify a controlling error of law.

Stutson v. United States, 516 U.S. 163, 178-79 (1996) (Scalia, J., dissenting) (citing 28 U.S.C. § 2106). The Eleventh Circuit

(Cont'd)
No. 4411, slip op. (M.D. Ala. April 18, 2000). This effort to give the Court of Appeals' language a more defensible basis, however, does not cure the error. First, the Eleventh Circuit's decision still casts unwarranted doubt on the validity of hundreds of orders, even if the District Court has declined to give it that effect. The Court of Appeals may yet attack the District Court's order as inconsistent with its order here. Second, the District Court's narrowed construction still permits the Eleventh Circuit's order to impact matters that were not before it on appeal.

had no authority to direct the nullification of orders that were not before it for review. A writ of certiorari should be granted to correct that error. Even if the Eleventh Circuit's order could be construed so as to avoid impinging on the proper limits of its jurisdiction, to order the District Court to restore a civil rights action to the "status quo ante," negating over four years of district court litigation and vacating scores of district court orders, without any regard for prejudice to the parties and without identifying any legal error in the orders affected by such a sweeping directive, so far exceeds the bounds of prudent appellate authority as to justify granting of certiorari.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant a writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

RICHARD GILL
COPELAND, FRANCO,
SCREWS & GILL
P.O. Box 347
Montgomery, AL 36101-0347
(334) 834-1180

ROBERT L. WIGGINS, JR.
GORDON, SILBERMAN, WIGGINS
& CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, AL 35203
(205) 328-0640

CHARLES T. LESTER, JR.
TERESA WYNN ROSEBOROUGH*
SUTHERLAND ASBILL
& BRENNAN LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996
(404) 853-8000

THOMAS J. HENDERSON
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005-0400
(202) 662-8600

* *Counsel of Record*

Attorneys for Petitioners